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NANCY MARVEL  
Regional Counsel  
United States Environmental Protection Agency, Region IX

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IVAN LIEBEN  
Assistant Regional Counsel  
United States Environmental Protection Agency, Region IX  
75 Hawthorne Street  
San Francisco, California 94105  
(415) 972-3914

Attorneys for Complainant

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 HAWTHORNE STREET  
SAN FRANCISCO, CALIFORNIA 94105

In the Matter of:	)	Docket No. FIFRA-09-2009-0013
	)	
Bug Bam Products, LLC	)	RESPONSE TO RESPONDENT'S
	)	MOTION TO DISMISS
	)	
Respondent	)	
	)	
	)	

On December 8, 2009, pursuant to 40 C.F.R. §§ 22.16(a) and 22.20(a), Bug Bam Products, LLC ("Respondent") filed a Motion to Dismiss the United States Environmental Protection Agency Region IX's ("EPA" or "Complainant") complaint in the above-captioned matter. In its complaint, filed September 18, 2009 ("Complaint"), EPA alleges that Respondent violated section 12(a)(1)(A) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") in three separate transactions by distributing or selling three unregistered pesticides. Respondent filed an Answer to the Complaint ("Answer") on October 15, 2009. Subsequently,

Complainant filed a motion seeking leave to file an Amended Complaint and a supplemental motion on November 18 and November 19, 2009, respectively, which are still pending.

In its Motion to Dismiss, Respondent claims that Complainant “can prove no set of facts . . . which would entitle [Complainant] to relief” and that EPA’s proposed penalty is “arbitrary and capricious” in violation of the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.* Complainant hereby provides the following Response to Respondent’s Motion to Dismiss.

## **I. Applicable Legal Standards**

### **A. Motion to Dismiss**

According to 40 C.F.R. § 22.20(a), the Presiding Officer may only dismiss a complaint “on the basis of failure to establish a *prima facie* case or other grounds which show no right to relief on the part of the complainant.” But the Consolidated Rules of Practice (“CROP”) at 40 C.F.R. Part 22 do not contain a specific legal standard by which to evaluate a motion to dismiss. When the CROP is silent, guidance may be found in other statements of the law, such as the Federal Rules of Civil Procedure. In the Matter of S&S Landfill, Inc., CAA-III-002 (EPA ALJ Sept. 22, 1994). In this case, the Presiding Officer can look to the standard under Rule 12(b)(6) of the Federal Rules of Civil Procedure as “guidance.” In the Matter of Agronics, Inc., CWA 6-1631-99, 2003 WL 21480370, (EPA ALJ 2003); In the Matter of Ferry County Noxious Weed Control District, FIFRA-10-2002-0048, 2003 WL 402870, (EPA ALJ 2003).

Under the Federal Rule, a movant has a high burden in showing that a motion to dismiss is warranted. In general, motions to dismiss are “viewed with disfavor and [are] rarely granted.” Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir.1982) (quoting Wright & Miller, Federal Practice & Procedure: Civil § 1357 at 598 (1969)). In fact, the threshold that a complaint must meet to survive a motion to dismiss for failure to

state a claim is “exceedingly low.” Ancata v. Prison Heath Serv., Inc., 769 F.2d 700, 703 (11th Cir. 1985) (quoting Quality Foods de Centro America, S.A. v. Latin American Agribusiness Devel., 711 F.2d 989, 995 (11th Cir. 1983)).

More specifically, a motion to dismiss should be denied if the complaint states facts that establish “plausible grounds” for the *prima facie* case alleged. See Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 556 (2007). In other words, “once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.” Twombly, 550 U.S. at 556; see also Conley v. Gibson, 355 U.S. 41, 47 (1957) (“the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”). Moreover, for purposes of deciding a motion to dismiss, the Presiding Officer must accept the material allegations of the pleading as true and construe the allegations in the light most favorable to the non-movant. See Colle v. Brazos County, 981 F.2d 237, 243 (5th Cir. 1993) (citations omitted).

#### **B. FIFRA Section 12(a)(1)(A)**

FIFRA section 12(a)(1)(A), 7 U.S.C. § 136j, makes it “unlawful for any person in any State to distribute or sell to any person any pesticide that is not registered under section 136a of this title . . .” Therefore to establish a *prima facie* case for a violation of FIFRA § 12(a)(1)(A), EPA must allege the following elements:

- 1) Respondent is a “person” as defined by FIFRA § 2(s), 7 U.S.C. § 136(s);
- 2) Respondent has distributed or sold, as defined by FIFRA § 2(gg), 7 U.S.C. § 136(gg),
- 3) A “pesticide” as defined by FIFRA § 2(u), 7 U.S.C. § 136(u); and
- 4) The pesticide is not registered under FIFRA § 136a, 7 U.S.C. § 136a.

## II. Argument

### A. EPA Pled Sufficient Facts to Establish a *Prima Facie* Case that Respondent Violated FIFRA § 12(a)(1)(A)

In the present case, Complainant alleged all of the *prima facie* elements necessary to establish violations of FIFRA § 12(a)(1)(A) in its initial Complaint and the pending Amended Complaint. In fact, Respondent has admitted that it is a person, Answer ¶ 1, that the products at issue are pesticides and that they were not registered under FIFRA § 3, Answer ¶¶ 6-7. The only allegation in EPA's Complaint that Respondent disputes is that it distributed or sold the pesticides. Answer ¶ 14; Motion to Dismiss at 5. Towards that end, Respondent alleges in its Motion that it has been wrongly named as a respondent because another entity, Flash Sales, Inc., actually distributed and sold these pesticides. Motion to Dismiss at 5-6.

In its initial Complaint, EPA alleged that Respondent distributed or sold pesticides because an EPA employee purchased three unregistered pesticides from a website "registered to, administered by, and under the control of" Respondent. Complaint ¶¶ 12-14, 17-19, and 22-24. In making its claim that it did not "distribute or sell" pesticides, Respondent appears to fundamentally misunderstand the statutory meaning of those terms, which are quite comprehensive. Specifically, FIFRA § 2(gg), 7 U.S.C. § 136(gg), provides that to "distribute or sell" means "to distribute, sell, *offer for sale*, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver" (emphasis added). By putting the pesticide products up for sale on its website, Respondent "offered" those pesticides for sale, which squarely falls within the statutory definition of "distribute or sell" under FIFRA. Thus, taking EPA's allegations as true, as

required in reviewing a motion to dismiss, EPA can prove a set of facts that would entitle it to relief, in this case a penalty, under FIFRA.<sup>1</sup>

**B. Respondent's Argument that EPA's Proposed Penalty is Arbitrary and Capricious Is Not a Grounds for Dismissal**

Respondent further claims that the Complaint should be dismissed because the proposed penalty is "unexplained" and is "arbitrary and capricious" in violation of the APA because there is no rational connection between the violations and the proposed penalty and the proposed penalty is inconsistent with the Agency's penalty policy. First, Respondent has not provided a legally cognizable basis for why the Complaint should be dismissed based upon the proposed penalty in consideration of the motion to dismiss standards. This alone warrants that the Motion should not be granted. Second, even if the Presiding Officer could consider an APA claim, EPA has not taken a "final agency action" that is reviewable under the APA. Finally, the proposed penalty meets the standard under 40 C.F.R. § 22.14(a)(4)(i).

In regard to the application of the APA, the APA strictly applies to "final agency action," and Complainant has only proposed a penalty at this point. See 5 U.S.C. § 704. A proposed penalty is not a "final agency action," and a penalty demand would only become a final action after the Presiding Officer issues her initial decision and the appeal options have been exhausted. See 40 C.F.R. §§ 22.27(c), 22.28(d) & 22.31. As EPA has not taken a final agency action, the penalty claim is not ripe for judicial review under the APA.<sup>2</sup>

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<sup>1</sup> While Complainant avers that the initial Complaint easily meets the liberal pleading standards for an administrative complaint, to remove any doubt, the proposed Amended Complaint specifically claims that Bug Bam is "offered to sell" the unregistered pesticide products at issue. Amended Complaint ¶¶ 26, 34, 42.

<sup>2</sup> Please note that the "arbitrary and capricious" standard of review is the standard established by the APA for judicial review only. See 5 U.S.C. § 702. However, the Environmental Appeals Board ("EAB") has at various times adopted that standard for reviewing an initial penalty decision by a Presiding Officer as part of its appellate review role. See In re U.S. Army, Fort Wainwright Central Heating & Power Plant, 11 E.A.D. 126 (EAB, June 05, 2003); see also In re Capozzi, 11 E.A.D. 10 (EAB, March 25, 2003). As an initial penalty decision has not been made here, these cases are inapplicable.

Finally, Complainant has easily met the minimal pleading requirements for a penalty under the CROP, which only requires identification of the “amount of the civil penalty” that is proposed and a “brief explanation of the proposed penalty.” 40 C.F.R. § 22.14(a)(4)(i). In its original Complaint, EPA proposed a penalty of \$11,500 and included a description of the statutory authority it had to assess the penalty and the factors EPA is required to consider in determining the proposed penalty amount. Complaint at 5. The penalty allegations in the proposed Amended Complaint are similarly pled. These pleadings meet the minimal requirements set forth at 40 C.F.R. § 22.14(a)(4)(i), and Respondent does not argue otherwise. Moreover, the proposed penalty will be fully explained in the administrative proceeding when required by the CROP. See, e.g., 40 C.F.R. § 22.19(a)(3) (explaining how Complainant must describe how the proposed penalty was calculated as part of its prehearing exchange). At that time, Complainant will show how the penalty proposed is consistent with the FIFRA statutory penalty factors and the Agency’s FIFRA Enforcement Response Policy, and Respondent will have the opportunity to marshal its counter-arguments.

### **III. Conclusion**

For the reasons set forth herein, the Complainant seeks the Presiding Officer to deny Respondent’s Motion to Dismiss.

Respectfully Submitted,

Dated: 12/18/09



Ivan Lieben  
Assistant Regional Counsel  
U.S. EPA, Region IX

In the Matter of Bug Bam Products, LLC  
Docket No. FIFRA-09-2009-0013


CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing Response to Respondent's Motion to Dismiss was filed with the Regional Hearing Clerk, U.S. EPA, Region IX, and that a copy was faxed and sent by Pouch Mail and first class certified return receipt mail, respectively, to:

The Honorable Barbara A. Gunning  
Administrative Law Judge  
Office of Administrative Law Judges  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Mail Code 1900L  
Washington, D.C. 20460  
Facsimile: (202)565-0044

and to: Martha E. Marrapese  
Keller and Heckman LLP  
1001 G Street, N.W., Suite 500 West  
Washington, D.C. 20001  
Facsimile: (202)434-4646

12/18/09  
Date

  
Corazon Tolentino  
Office of Regional Counsel  
U.S. EPA, Region IX

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## U.S. ENVIRONMENTAL PROTECTION AGENCY

### Office of Regional Counsel

Region IX

75 Hawthorne Street

San Francisco, CA 94105

Phone Number (415) 947-8705

Fax Number (415) 947-3570, 947-3571

### PLEASE DELIVER TO:

NAME	THE HONORABLE BARBARA GUNNING
FAX #	(202) 565-0044
PHONE #	
OFFICE	
NAME	MARTHA E. MARRAPESE
FAX #	(202) 434-4646
PHONE #	
OFFICE	
NAME	
FAX #	
PHONE #	
OFFICE	

### FROM:

NAME	ORAZON TOLENTINO
PHONE #	(415) 972-3879
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